Supreme Court, U.S.
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Nos. 95-1460 and 95-1425

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief, we argued that the court-ordered remedial plan in this case deviates unjustifiably from the one-person, one-vote requirement of Article I, Section 2 of the United States Constitution; fails to satisfy the mandate of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, of equal

opportunity for minority voters to participate in the political process and elect representatives of their choice; and violates the rule set forth in *Upham* v. *Seamon*, 456 U.S. 37 (1982), that a court that creates a redistricting plan must not transgress state redistricting policy beyond what is required to correct the constitutional defects it finds. In addition, we pointed out that, although the question need not be reached, the district court's plan also violates the substantive nonretrogression standard embodied in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

Appellees choose simply not to confront several of the key premises of our argument. Rather than attempt to defend the district court's clearly erroneous finding that the Illustrative Plan "splits numerous counties," they disregard it. See pp. 3-4, *infra*. Rather than challenge the district court's correct finding that Georgia's redistricting policy favored creating two compact majority-minority districts if possible, appellees ignore it. See pp. 11-12, *infra*. And rather than acknowledge that the district court's own findings establish that legally significant racially polarized voting exists in east-central Georgia, appellees attack us for relying on the facts as found by the district court. See pp. 6-8, *infra*. Those points, along with others addressed below, establish that the judgment of the district court should be reversed.

1. *Section 2.*

a. *Compactness.* The Johnson appellees argue (Br. 16-19) that the clearly erroneous standard of review applies to the district court's finding that African-Americans in east-central Georgia are not sufficiently compact and numerous to form a majority in a congressional district in that area. We agree that

that is the proper standard of review. The district court's finding, however, was clearly erroneous.

As we explain in our opening brief, the Illustrative Plan demonstrates that African-Americans in the east-central part of the State would be a majority in a reasonably compact district. The district court gave only one reason for rejecting the Illustrative Plan: That it "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a n.4. Because the Illustrative Plan in fact splits only two counties outside of the Atlanta area, and because both of those divisions are explicable on non-racial grounds, the district court's conclusion was clearly erroneous. See U.S. Br. 15-18.[1]

Although the state appellees quote (Br. 28-29) the district court's flawed finding regarding the Illustrative Plan, neither group of appellees discusses it or explains how it could be correct. They do not argue that the Illustrative Plan splits "numerous counties"

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[1] The Johnson Appellees assert (Br. 10) that the Illustrative Plan "intensifies the racial line drawing in DeKalb and Bibb Counties," and they cite in support the district court's finding that Bibb County was racially gerrymandered in the plan declared unconstitutional by this Court. See J.S. App. 35a n.4. With respect to the Atlanta-area DeKalb County, which was divided in virtually every plan before the court, the Illustrative Plan cleanly divides the County along a north-south line and connects the southern portion with the neighboring counties to the south and east. With respect to Bibb County, the division of the county in the Illustrative Plan bears no resemblance to the division of that county in the unconstitutional 1992 plan, which joined a virtually non-contiguous portion of Bibb County to the Second District. Instead, the Illustrative Plan divides Bibb County in three clean parts and does not use "land bridges" or other mechanisms to circumnavigate areas of white population.

outside the Atlanta area. Nor do they contest the fact that the Illustrative Plan's division of two counties outside the Atlanta area serves to lower the overall population deviation of the Illustrative Plan and leave all of Fort Benning in a single district.[2] Those facts are sufficient to establish that the district court clearly erred.

Both the Johnson appellees and the state appellees do advance other arguments—not relied on or even adverted to by the district court—as to why the Illustrative Plan should be rejected. They argue, for example, that the Illustrative Plan was submitted too late. See State Appellees' Br. 27-29; Johnson Appellees' Br. 45-46. We disagree with that contention. The Illustrative Plan was submitted in response to the district court's request for comments on the plan that became the basis for the court's remedy; its purpose was to demonstrate that the plan would violate

[2] The Johnson appellees argue (Br. 13) that the Illustrative Plan and other plans "maintain[] the Second District as a viable minority district based on total population adjusted by deletion of non-voting military population," because those plans "incorporate a large non-voting, predominantly white military population at Ft. Benning." It is true that the Second District in the Illustrative Plan includes Ft. Benning. Appellees' remaining contentions, however, are unsupported by any findings of the district court, and appellees do not cite any record evidence in support of their assertions regarding the racial breakdown of the Ft. Benning military population or the extent to which that population votes in local elections. In any event, if the import of appellees' remarks is that the Illustrative Plan is defective because African-Americans may have the opportunity to elect a candidate of their choice there, they misapprehend the law in this area; the fact that a district would offer such an opportunity surely does not prove or suggest that it is defective.

Section 2. In any event, although appellees objected in the district court to what they believed was the late submission of the Illustrative Plan, the district court did not expressly rule on their objections. Instead, the district court rejected the Illustrative Plan (mistakenly, we contend) entirely on its merits. See J.S. App. 8a n.4. This Court should decline appellees' invitation to adjudicate in the first instance an objection regarding the district court's procedures.

The Johnson appellees argue (Br. 10) that the Illustrative Plan is not compact because two of its districts include what they believe to be "misplaced cores" that properly should be located in other districts.[3] The district court never adopted appellees' unexplained concept of "district cores." The district court did state that Georgia "has historically pre-

[3] Appellees (but not the court) identify (Br. 10 n.17) the four district cores as South DeKalb County (Fourth District), Augusta/Richmond County (Tenth District), Macon/Bibb County (Eighth District), and Savannah (First District). Appellees' identification of "district cores" is very questionable. For example, they claim (Br. 10) that Macon has been "the commercial core of the Eighth District for decades." In fact, Macon was located at the northern edge of the Eighth District—whose center is far to the south—for 19 years (not "decades") prior to the recent redistricting. See 94-631 J.S. 79, 80 (maps). Prior to that time, from 1933 through 1971, it was located in the Sixth District in the central or west central portions of the State. See *id.* at 78, 81 (maps). In any event, of the four district "cores" identified by appellees, the Illustrative Plan retains all of two of them and part of two others in what appellees view as the "proper" district. The court's plan also places part of one of those "cores"—southern DeKalb County—into the "wrong" (*i.e.*, the Fifth) district. Moreover, unlike the Illustrative Plan, the court's plan moves Athens/Clark County—which has been part of the Tenth District since at least 1933, see *id.* at 81 (map)—into the Eleventh District.

ferred to maintain the core of each district during reapportionment." J.S. App. 10a. The district court viewed the State's interest in "maintaining district cores" as an interest in keeping as many counties as possible together when the State is redistricted. The district court stated that its plan "maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan." J.S. App. 10a. See also *id.* at 17a-18a. As we explained in our opening brief, the Illustrative Plan is superior to the court's plan on that measure. See U.S. Br. 24 n.16 (Illustrative Plan keeps 101 counties totally or partially within the same district as the 1982 plan).

b. *Racially polarized voting.* The Johnson appellees argue (Br. 34-37) that the appellants offered no evidence during the remedy hearing below of racially polarized voting. As we explained in our opening brief (Br. 26-27), however, the district court's own findings regarding the degree of racially polarized voting—findings that in our view substantially understate its degree[4]—demonstrate that a majority-preferred can-

[4] Appellees attack (Johnson Appellees' Br. 36-37; State Appellees' Br. 31) the methodology used by Dr. Allan Lichtman, the expert who testified for the United States regarding racially polarized voting at the original trial in this case. We based our argument that there is legally significant racially polarized voting in the east-central portion of the State on the district court's own findings on that subject. We referred to Dr. Lichtman's testimony (U.S. Br. 28-29) to demonstrate that the district court underestimated the problem, but that point was not necessary to our argument. Nevertheless, we continue to believe that Dr. Lichtman's testimony was sound. Indeed, Dr. Lichtman's methodology, including his emphasis on elections in which minority candidates ran against white candidates, was the same methodology relied upon by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 52-53 (1986)

didate would usually be unable to win election in any of the districts in the east-central portion of Georgia under the court's plan.[5] That conclusion is buttressed by, *inter alia*, the fact that courts have found racially polarized voting in past cases in several counties in the east-central portion of the State, see *id.* at 28, and by the district court's conclusion—relying on a statewide study whose conclusions are equally applicable across the State—that racially polarized voting *is* present in sufficient degree to establish a violation of Section 2 that requires a

(relying on data from "53 General Assembly primary and general elections *involving black candidacies*") (emphasis added). See also *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244-1245 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1316-1317 (E.D. Ark.), aff'd, 488 U.S. 988 (1988); compare *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502-504 (5th Cir. 1987) ("[t]hat blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference"), cert. denied, 492 U.S. 905 (1989). The fact emphasized by appellees—that a different three-judge court in a different case reviewing different evidence rejected the analysis given in that case by Dr. Lichtman—has little bearing on the validity of his testimony here.

[5] The State appellees (Br. 32) attack our calculations as "assuming crossover voting percentages similar to what the [district] court found existed." In this regard appellees are correct. For purposes of our analysis before this Court, we assume that the district court's crossover findings were correct and then demonstrate that, even operating under those (in our view, overly optimistic) statistics, racial polarization would usually prevent African-American voters from electing candidates of their choice in the Eleventh District under the district court's plan.

majority-minority district be created in the Atlanta area, see U.S. Br. 29-30.[6]

The State appellees (Br. 31) and the Johnson appellees (Br. 35-36) both contend that the doctrine of res judicata—or, more precisely, the doctrine of law of the case—precludes us from disputing what appellees believe to have been a finding in the district court's first decision in this case of a lack of racially polarized voting. They argue that that finding is now binding on the parties because this Court ultimately affirmed the district court's decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The resolution of a legal issue by a lower court, however, is never binding in this Court unless this Court has necessarily relied on that ruling in a previous decision.[7] In its previous

[6] The Johnson appellees also allege (Br. 37) that racially polarized voting could not be found on the record in this case because the polarization evidence at trial concerned the Eleventh District in the State's (unconstitutional) 1992 plan, which contains some different counties from the Eleventh District in the Illustrative Plan. Although the configurations of the two versions of the Eleventh District are quite different, they nonetheless contain substantial overlap. Therefore, evidence regarding polarization in the area of the State in which they overlap is relevant in analyzing both districts. In addition, of the six counties that are included in the Eleventh District in the Illustrative Plan but not included in the 1992 Eleventh District, see Johnson Appellees' Br. 37 n.60, the record in fact contains racial bloc voting data for three of them. See J.A. 79 (Bibb and Baldwin Counties), J.A. 81 (Newton County). The other three counties—Jones, Morgan, and Rockdale—contain only 15% of the district's population, and there is no evidence that racial voting patterns in those counties differ from the neighboring counties in the district.

[7] See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4478, at 789 ("[Q]uestions that have not been decided do not become law of the case merely because they could have been decided.").

decision in this case, this Court did not reach any question regarding the degree of racially polarized voting in Georgia, because it disposed of the case on the ground that the Eleventh District as then drawn did not represent a compact and contiguous concentration of African-American voters. Therefore, this Court's prior decision in this case has no preclusive effect with respect to any issue regarding racially polarized voting.

c. *Other arguments.* Appellees advance several other arguments why Section 2 can be disregarded in this case. All of them are mistaken.

For example, the Johnson appellees argue (Br. 32) that, because "Section 2(b) requires we rely on the actual 'results' of elections, rather than predictions," and because "[t]here is no past track record to judge the 'effects' of a preexisting district's lines," it cannot be concluded that there is a violation of Section 2. A violation of Section 2(b) is shown, however, if it can be demonstrated that members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Where it can be shown that such a lessening of the minority's "opportunity" would result from a newly-imposed plan, a violation of Section 2(b) is established. The fact that the plan is newly enacted or newly imposed has never been viewed as a defense,

and appellees cite no authority for granting such a sweeping immunity.[8]

The Johnson appellees also urge (Br. 31-33) that the results of the primary elections held a few months ago, *after* the court below rendered its decision, demonstrates that the court's plan satisfies Section 2. In the only one of those elections of possible relevance to this case, the African-American incumbent who had been elected under the prior plan—Congresswoman Cynthia McKinney—ran in the Fourth District under the court's plan and won the Democratic primary. But the bare fact that Congresswoman McKinney won a Democratic primary election is hardly probative. Appellees offer no explanation or analysis regarding the extent to which the Democratic primary vote was racially polarized. In this regard, just as a minority candidate's loss in one election does not establish legally significant racially polarized voting, a minority-preferred candidate's victory in a single election does not establish its absence. Moreover, this Court has explained that a single election's results may not be accorded overwhelming weight in the analysis of racially polarized voting, because "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Thornburg* v. *Gingles*, 478 U.S. 30, 57 (1986). And

[8] This Court and the lower courts have frequently adjudicated Section 2 challenges to newly-enacted or newly-imposed districting plans without intimating that such plans are immune from Section 2 liability. See, *e.g.*, *Growe* v. *Emison*, 507 U.S. 25 (1993); *Voinovich* v. *Quilter*, 507 U.S. 146 (1993); *Johnson* v. *DeGrandy*, 114 S. Ct. 2647 (1994).

there remains the possibility that "special circumstances" such as incumbency, see *id.* at 57, rendered a particular election atypical and therefore not reflective of the general extent of racially polarized voting in a jurisdiction.[9]

2. *Adherence to State Policy.* In our opening brief (Br. 33), we emphasized the district court's statement that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the [district court] would have included one since Georgia's legislature probably would have done so." J.S. App. 21a n.16. Yet, as we explained, the Illustrative Plan demonstrates that Georgia's legislative preference to create a second majority-minority district could have been satisfied "without subverting traditional districting principles." The district court's failure to respect the legislative preference was the result of its error in rejecting the Illustrative Plan. See p. 3, *supra*. Consistent with *Upham* v.

[9] We noted in our opening brief (Br. 21) that it is relevant to the totality of the circumstances in this case that African-Americans constitute 27% of the State's population but under the district court's plan will constitute a majority in only 9% (one out of eleven) of the congressional districts. The State appellees harshly criticize our discussion of that fact (Br. 30 n.4), stating that "it is difficult to imagine a more circular argument." This Court, however, has held that proportionality "is obviously an indication that minority voters have an equal opportunity" and it has held that disproportionality too has varying degrees of "probative value," depending on the other facts in the case. *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2661 & n.17 (1994); see also *id.* at 2664 (O'Connor, J., concurring) ("proportionality * * * is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive").

Seamon, 456 U.S. 37 (1982), that error should be corrected.[10]

Appellees simply disregard the district court's specific finding that Georgia's legislature would have drawn a second majority-minority district. That finding was supported by ample evidence. The first plan adopted by the State following the 1990 census—prior to any objection by the Department of Justice—included two majority African-American districts, one of which resembled the Eleventh District in the Illustrative Plan. Compare J.S. App. 46a (1991 Plan map) with *id.* at 44a (Illustrative Plan map). Accordingly, it provides strong support for the district court's finding that the State's districting policies included a desire to create two majority-minority districts, if that could be accomplished consistent with its other traditional districting policies.

Appellees argue (State Appellees' Br. 10-11; Johnson Appellees' Br. 6-8) that the State's 1991 plan was tainted by interference from the Department of Justice and therefore did not represent the State's genuine preferences regarding redistricting. Their claim

[10] The state appellees err in claiming (Br. 21) that our argument is based on "the assumption that any plan that contains significant changes from the old [*i.e.*, unconstitutional] plan * * * must automatically fail to be a 'minimum change' plan and must therefore violate the constraints of *Upham* v. *Seamon*." That is not the argument advanced in our opening brief (see U.S. Br. 32-35), and it is not an argument we support. As our brief made quite clear, our argument does not rest on the assumption that the district court's remedy had to resemble the plan declared unconstitutional to any specific degree. It does rest on the premises—found by the district court—that state policy favors the drawing of a second majority-minority district in the east-central portion of the State and that that policy should be respected.

that the taint arose from a speech by Assistant Attorney General John Dunne at a 1990 meeting is, however, belied by the printed version of Mr. Dunne's remarks. Those remarks, which are in the record in this case, simply recognize that objections had been interposed in Georgia and a number of other States after the 1980 redistricting, and that Georgia's effort to obtain judicial preclearance at that time had been unsuccessful. See Pl. Exh. 198, at 5, 6. In any event, the district court made no finding that the 1991 plan was tainted. Rather, the court stated that that plan (which the court mistakenly referred to as "the first plan enacted in 1992") "gave * * * a clearer understanding of legislative intent." J.S. App. 13a & n.9. The court's only reservation was that the 1991 plan was not "a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh." J.S. App. 13a n.9. But absent a finding that the State included those features for reasons of race and in contravention of its traditional districting principles, the fact that the 1991 Eleventh District shared some geographical features with the plan ultimately declared unconstitutional is of no significance. See, *e.g.*, *Bush* v. *Vera*, 116 S. Ct. 1941, 1951 (1996) ("For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race."); *id.* at 1969 (O'Connor, J., concurring) ("Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.").

Both sets of appellees (State Appellees' Br. 19-21; Johnson Appellees' Br. 21-24) argue that the district court was justified in departing from state policy in this case because of the vital need to remedy viola-

tions of the Equal Protection Clause and remove all vestiges of the underlying violation. We agree that district courts possess broad powers to do what is necessary to cure such violations. The district court had whatever authority it needed in this case to see to it that the racial gerrymandering in the unconstitutional plan was remedied. It does not follow, however, that the district court had the discretion not only to eliminate racial gerrymandering, but also gratuitously to ignore other, constitutional state policies. The essence of a violation of the principles of *Shaw* v. *Reno*, 509 U.S. 630 (1993), is that the State has departed substantially from its traditional districting principles and has done so on the basis of race. See *Bush* v. *Vera*, 116 S. Ct. at 1951; *id.* at 1969 (O'Connor, J., concurring). No opinion of this Court suggests that a district court faced with a *Shaw* violation must intentionally depart from valid and constitutional state policies—and disregard Section 2 of the Voting Rights Act—in order to avoid creating a majority-minority district. Any such principle would gratuitously disadvantage minority groups in the districting process and should be rejected.

3. *One-Person, One-Vote.* The Johnson appellees argue (Br. 46) that the divergence in the court's plan from the one-person/one-vote principle is acceptable. They rely on the average deviation in the two plans—the sum of the divergence in each district from absolute population equality divided by the number of districts. In our view, that measure tends to understate the difference between the two plans. This Court in *Karcher* v. *Daggett*, 462 U.S. 725, 732, 737 n.8, 739 & n.10, 741 (1983), accordingly relied instead on the measure of overall population deviation, see U.S. Br. 6 n.3, which the *Karcher* Court called "maximum

deviation." Nonetheless, the Johnson appellees concede (Br. 43) that even the average deviation in the court's plan is greater than the average deviation in the Illustrative Plan.[11] Their argument that it is not *much* greater is unavailing in light of what the district court itself conceded were the strict standards that apply to court-ordered redistricting. J.S. App. 7a.

Appellees both argue (Johnson Appellees' Br. 44-46; State Appellees' Br. 39) that the greater deviation in the court's plan is justified because the court's plan better adheres to Georgia's desire to maintain county lines intact. As we noted in our opening brief, this Court has rejected the proposition that county lines are sacrosanct in the congressional redistricting process. U.S. Br. 17 (citing *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533-534 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969); *White* v. *Weiser*, 412 U.S. 783, 791 (1973)). Moreover, Georgia historically maintained county boundaries intact in part "to undermine the voting strength of counties with large black populations." J.S. App. 40a. The State has frequently split county boundaries in the Atlanta area (where both the court plan and the Illustrative Plan split *every* county), and in the 1970s the State did so outside the Atlanta area in Whitfield County, as the state appellees concede (Br. 24-25). Especially in light of the

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[11] The table showing the deviations in each district in the Johnson appellees' brief (at 43) contains two errors. First, the Second District in the court's plan had a deviation of -.23 (not -.023). Second, the deviations listed for the Sixth District are reversed; the deviation in the court's plan is .11 and the deviation in the Illustrative Plan is .04. The correct calculations for the average deviations in the two plans are .112% for the court's plan and .065% for the Illustrative Plan.

stringent standards governing court-ordered districting plans, the district court was not justified in adopting a plan that unnecessarily departs from "precise mathematical equality," *Kirkpatrick*, 394 U.S. at 530-531, in order to avoid the two county splits in the Illustrative Plan.[12]

4. *Section 5.* The Johnson appellees (Br. 37-42) and the state appellees (Br. 42-47) argue that our analysis of the retrogressive effect of the court's plan under Section 5 of the Voting Rights Act is mistaken. As we explained in our opening brief (U.S. Br. 43 n.25), this question seems largely theoretical here, since its resolution in the context of this case turns on essentially the same issues as does the resolution of the *Upham* v. *Seamon* and Section 2 claims. Nonetheless, insofar as this issue is of importance, appellees do not identify any error in our analysis.

The Johnson appellees (Br. 40) are mistaken in characterizing our argument as "contending the Section 5 benchmark to be however many minority districts Section 2 requires." To the contrary, the Section 5 benchmark is "the 1992 Plan, modified as necessary to cure its unconstitutional defects." U.S. Br. 42. In this case, that turns out to be a plan with two majority-minority districts—the same number required by Section 2. In other cases, however, the Section 5 benchmark could require a State to draw more or fewer districts than Section 2 does. For example, had the State never drawn more than one majority-minority district, the Section 5 benchmark could not have more than one majority-minority district. That would be true even if Section 2 required the State to draw additional districts.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case should be remanded to the district court with instructions to develop and put in place a new plan that is consistent with constitutional one-person, one-vote requirements and that contains two compact majority-minority districts.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

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[12] The Johnson appellees note (Br. 44) that the plan this Court found unconstitutional in *Miller* had a .93% overall population deviation. They then argue (*ibid.*) that "[b]ecause the district court was not charged with curing any unconstitutional deviations, *Upham* v. *Seamon* would arguably preclude any gratuitous changes to a district just to improve the population deviation." If appellees are suggesting that the district court was *precluded* from attempting to minimize the population deviation in the plan it drew, appellees are mistaken; the court was *required* to do so. Because the State simply cannot have a legitimate policy to have larger than minimum population deviations in its congressional districting plan, the fact that the State has previously adopted plans with larger than necessary deviations provides no basis for the district court to do so. See *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975).